

Joseph F. Pitta
Monterey County Recorder
Recorded at the request of

RAUBREY
10/12/2001
8:47:36

RECORDING REQUESTED BY:

U. S. Army Corps of Engineers
Real Estate Division, ATTN: CESP-K-RE-MC
1325 J Street
Sacramento, California 95814-2922

State of California

DOCUMENT: **2001086497**



2001086497

Titles: 1/ Pages: 13

Fees....
Taxes...
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WHEN RECORDED, MAIL TO:

Department of Toxic Substances Control
Northern California Region
Office of Military Facilities
ATTN: Anthony J. Landis, Chief
10151 Croydon Way, Suite #3
Sacramento, California 95827

(Space Above This Line For Recorder's Use Only)

**RESTRICTION AND
COVENANT TO RESTRICT USE OF PROPERTY
ENVIRONMENTAL RESTRICTION**

Re: A Portion of the former Fort Ord Installation, Fritzsche Army Airfield now known as Marina Municipal Airport, Parcel L5.1.1 (also known as Site OE-34).

This Covenant and Agreement ("Covenant") is made by and between the United States of America acting by and through the United States Army (also referred to herein as the "Covenantor"), the current owner of the real property located in the City of Marina, County of Monterey, State of California, shown on Exhibit A and described in Exhibit B, attached hereto and incorporated herein by this reference (the "Property"), and the State of California acting by and through the California Department of Toxic Substances Control ("Department"). The Department and the Covenantor have determined that this Covenant is reasonably necessary to protect present or future human health or safety or the environment. The Department and the Covenantor also wish to expedite the transfer of this property to the City of

FAAF CRUP 6/12/00

Marina pursuant to the "early transfer" requirements of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA", 42 USCA section 9601 et seq.) section 120(h). All of the Fort Ord facility is subject to the requirements of CERCLA.

As part of the "early transfer" the United States Army has prepared a Finding of Suitability for Early Transfer ("FOSET") which specifically provides that the property is suitable for early transfer only for the intended use as a resort hotel and golf course, business park, airport support and related infrastructure modifications. Accordingly, the United States Army hereby restricts the use of the Property to those contained in the FOSET (as shown on Exhibit C).

The FOSET requires certain "Contractual Assurances" and the Covenantor has determined that those assurances should be contained in a covenant. The Department and Covenantor have determined that for ease of reference all restrictions other than those found in any deed conveying the Property should be contained in one document.

The Covenantor and the Department, collectively referred to as the "Parties", therefore intend that the use of the Property be restricted as set forth in this Covenant, in order to protect human health, safety and the environment.

The Covenantor retains sufficient legal title and interest in the subject property to insure continuing enforcement of the protective covenants and agreements contained within this Covenant to Restrict the Use of Property. Further in any subsequent transfers or conveyance of title to nonfederal entities the Army shall burden the property with additional deed covenants that insure that any subsequent deed or transfer contains the protective covenants and right of access and power to conduct monitoring of any Ordnance and Explosives (OE) retained on site. Those covenants and agreements shall be enforceable against the servient estate in that those protective covenants shall run with the land to all successors and assigns, except as otherwise provided in this covenant.

ARTICLE I

STATEMENT OF FACTS

1.01 The U.S. Army Corps of Engineers' Engineering Evaluation/Cost Analysis Phase I, Former Fort Ord, Monterey County, California, September 1997, includes additional details of the identification of the range and actions taken to date to detect and render safe ordnance and explosives ("OE") found on the Property.

1.02 The Property was historically used as a 2.36" rocket and rifle grenade practice range. The Army's initial clearance effort encompassed the entire 71.4 acres. Results of the effort, along with the Army's analysis of data, was presented in the Engineering Evaluation/Cost Analysis Phase I, Former Fort Ord, which was finalized by the Army in September 1997. In this

investigation, several 2.36" rockets were found, and detonated. The contractor's opinion was that these rockets were inert, practice rockets. In April 1999, the United States Environmental Protection Agency contracted with UXB International to resurvey approximately 10 percent of the 71.4 acre site. No unexploded ordnance (UXO) was discovered. One 2.36 inch inert practice rocket was found.

In late 1999 and early 2000, the Army directed USA, Inc. to conduct an investigation and removal activity on the entire 71.4 acre site. A 100 percent OE investigation was conducted. This was a surface investigation using an EM-61 which senses irregularities (anomalies) in the subsurface which could be OE items. This investigation included analysis of all anomalies and excavation of anomalies designated by the responsible geophysicist. In this investigation and removal, no UXO was discovered. A significant amount of OE scrap was discovered, including fragments of 2.36" inert practice rockets.

The Covenantor is now in the process of developing and implementing a remedial investigation and feasibility study ("RI/FS") for OE at Fort Ord.

1.03 Some portion of the surface and subsurface soils of the Property may contain OE. OE is a hazardous material (as that term is defined in Health and Safety Code section 25260, reference to which is made herein for purposes of definition only).

1.04 The City of Marina has adopted an ordinance (98-04) that addresses the potential OE risk by requiring permits for certain excavation activities. A copy of the ordinance is attached to this Covenant as Exhibit D.

1.05 The Army has issued a Finding of Suitability for Early Transfer (FOSET) dated August 1, 2000, to transfer the Property prior to completion of the RI/FS and a final assessment of the adequacy of any interim response action. This type of transfer is subject to the requirements of Section 120(h)(3)(C) of CERCLA, and requires a determination by the Administrator of the U.S. Environmental Protection Agency, with the concurrence of the state Governor, that the Property is suitable for transfer. The FOSET states that the intended reuse of the Property is as a resort hotel and golf course, business park, airport support, and related infrastructure modifications.

1.06 CERCLA Section 120(h)(3)(A)(ii)(I) requires a deed covenant warranting that all remedial action necessary to protect human health and the environment with respect to any substances remaining on the property has been taken before the date of the transfer. The required covenant may be deferred when the deed or other agreements contain response action assurances, as specified in CERCLA Section 120(h)(3)(C)(ii)(I-IV), that ensure that the property is suitable for the use intended by the transferee, use restrictions are in place to ensure the protection of human health and the environment, use restrictions will also ensure that transfer will not disrupt remedial activities, and an assurance from the Army that it will request adequate funds to address

schedules for investigation and completion of all actions necessary to support the subsequent issuance of the required CERCLA 120(h)(3)(A)(ii)(I) covenant. In addition, CERCLA requires certain assurances which are contained in Article V.

ARTICLE II

DEFINITIONS

2.01 Department. "Department" means the State of California by and through the California Department of Toxic Substances Control and includes its successor agencies, if any.

2.02 Covenantor. "Covenantor" means the United States of America acting through the United States Army.

2.03 Owner. "Owner" shall include the Covenantor, its successors in interest, and their successors in interest, including heirs and assigns, during his or her ownership of at any time all or a portion of the Property.

2.03 Occupant. "Occupant" shall mean Owners and any person or entity entitled by ownership, leasehold, or other legal relationship to the right to occupy any portion of the Property.

2.04 Property. "Property" shall mean the approximate 71.4 acre site more particularly shown in Exhibit A and described in Exhibit B. The Property is located on the United States Army facility of Fort Ord on the northern portion located in the City of Marina.

ARTICLE III

GENERAL PROVISIONS

3.01 Restrictions to Run with the Land. This Covenant sets forth protective provisions, covenants, restrictions, and conditions (collectively referred to as "Restrictions"), subject to which the Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. Each and every Restriction: (a) runs with the land pursuant to Civil Code section 1471; (b) inures to the benefit of the Department and passes with each and every portion of the Property; (c) shall apply to and bind all subsequent Occupants of the Property except as otherwise provided in this Covenant; (d) is for the benefit of and is enforceable by, the Department; and (e) is imposed upon the entire Property unless expressly stated as applicable only to a specific portion thereof, unless modified or terminated as provided for within.

3.02 Binding Upon Owners and Occupants. This Covenant shall be binding upon all of the Owners and Occupants of the land, their heirs, successors, and assignees, and the agents, employees, and lessees of the Owners and Occupants, heirs, successors, and assignees and all successive Owners and Occupants of the Property are expressly bound hereby for the benefit of the covenantee(s) herein.

3.03 Written Notice of Presence of OE. Prior to the sale, lease, or sublease of the Property, the owner, lessor, or sublessor shall give the buyer, lessee, or sublessee notice that there is the potential for the presence of ordnance and explosives in the soil of the Property. Such notice shall include a statement describing the OE survey efforts for the Property as discussed in section 1.02 herein.

3.04 Accompaniment to Deeds and Leases. This Covenant shall accompany all deeds and leases for any portion of the Property, unless terminated as provided for within.

3.05 Conveyance of Property. The Owner shall notify the Department at least thirty (30) days before executing any document conveying any ownership interest in the Property (excluding short-term rentals and leases, mortgages, liens, and other non-possessory encumbrances). The Department shall not, by reason of this Covenant, have authority to approve, disapprove, or otherwise affect any proposed conveyance, except as otherwise provided by law.

ARTICLE IV

RESTRICTIONS

4.01 Suitable Activities. As set forth above, the United States Army has found that the Property is only suitable for the intended use as resort hotel, golf course, business park, airport support, and related infrastructure modifications as set forth in the FOSET, and has accordingly restricted use of the Property. It is specifically understood that uses which are typically ancillary to the above described uses and/or are intended for the use of guests and/or employees of those uses, are permitted, including but not limited to meeting and conference facilities, training facilities associated with hotel or resort operations, employee dining facilities, cafeterias and other eating facilities, barber and beauty shop and related service activities, business support services, and golf maintenance facilities.

In addition, the following uses as hereinafter described shall also be allowed provided that they do not include private landscaping or unsurfaced yard areas: timeshare and vacation club rooms, spa, health, athletic and related facilities, commercial recreation facilities other than the golf course, employee recreation facilities, day care facilities and nurseries, caretaker units, and

airport loft living units.

Uses inconsistent with those described in this section are prohibited without written approval of the Covenantor and the Department.

4.02 Soil Management. The provisions of the City of Marina ordinance 98-04, attached as Exhibit D are incorporated herein as restrictions of this Covenant.

4.03 Access. The Department shall have reasonable right-of-entry and access to the Property for inspection, monitoring, and other activities consistent with the purposes of this Covenant as deemed necessary by the Department in order to protect the public health and safety and oversee any required activities.

ARTICLE V

CERCLA REQUIRED RESPONSE ASSURANCES

5.01 Projected Schedule of Remedial Investigation/Feasibility Study. The Covenantor agrees to pursue as diligently as possible the following projected schedule.

Remedial Investigation (RI)	Sept. 2001
Feasibility Study (FS)	Sept. 2001
Proposed Plans	April 2002
Record of Decision (ROD)	Nov. 2002

5.02 Construction Support. If necessary, the Owner/ and or Occupant will provide adequate construction support pursuant to a workplan approved by the Covenantor, EPA, and the Department.

5.03 Deferred Warranty. Upon EPA and DTSC concurrence, consistent with the CERCLA process, and with the Army's determination that all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken, the United States shall execute and deliver to the property recipient an appropriate document containing a warranty that all such response action has been taken, and the making of the warranty shall be considered to satisfy the requirement of CERCLA 120(h)(3)(A)(ii)(I). This warranty shall be in a form that is recordable in the Office of the Recorder, Monterey County, California.

5.04 Long Term OE Risk Management. For the term of this Covenant as provided in Article VII, measures that will be implemented for the Property include: (1) annual notification and invitation to the annual public education meeting; (2) recurring reviews by the Covenantor to determine if the response actions, taken at the OE site continue to be adequate; and (3) a close-out report documenting that the recurring reviews and response actions have effectively addressed the risks posed at the OE site.

5.05 Budgeting for Response Actions. The Covenantor has submitted and will continue to submit through its established budget channels to the Director of the Office of Management and Budget a request for funds that adequately addresses schedules for investigation and completion of all response actions required. Expenditure of any Federal funds for such investigations or response actions is subject to congressional authorization and appropriation of funds for that purpose. The Covenantor will submit its funding request for the projects needed to meet the schedule of necessary response actions as follows:

a. The projects for the necessary Remedial Investigation/Feasibility Study will be identified to and coordinated with the Base Realignment and Closure, Base Cleanup Team (BCT).

b. After coordination with the BCT, the projects will be submitted through Training and Doctrine Command to Department of the Army, Base Realignment and Closure Office for funding validation and approval.

c. All correspondence regarding these projects will recite that these projects are being undertaken on property being transferred pursuant to CERCLA 120(h)(3)(C) and that once validated, approved, and funded, the funding may not be withdrawn without the consent of the Assistant Secretary of the Army for Installations and Environment.

ARTICLE VI

ENFORCEMENT

6.01 Enforcement. Failure of the Owner or Occupant to comply with any of the Restrictions specifically applicable to it shall be grounds for the Department, by reason of this Covenant, to require that the Owner or Occupant modify or remove any improvements ("Improvements" herein shall include, but are not limited to, all buildings, roads, driveways, and paved parking areas, etc.) constructed or placed upon any portion of the Property in violation of the Restrictions. Violation of this Covenant shall be grounds for the Department to file civil and/or criminal actions including nuisance or abatement against the Owner or Occupant as provided by law.

ARTICLE VII

VARIANCE, TERMINATION, AND SUPERSESSION

7.01 Variance. Any Owner or, with the Owner's written consent, any Occupant of the Property or any portion thereof may apply to the Department for a written variance from the provisions of this Covenant.

7.02 Termination and Supersession. Any Owner, and/or any Occupant, with the Owner's written consent, of the Property, or any portion thereof, may apply to the Department for a termination of the restrictions or other terms of this Covenant as they apply to all or any portion of the Property. Such application shall be made in accordance with Health and Safety Code section 25234 as applicable.

Upon the completion of the RI/FS and implementation of all required remedial action, the Department will review whether the Restrictions of this Covenant are no longer necessary to protect human health, safety and the environment. Unless the Director, after affording interested parties an opportunity to be heard, both orally and in writing, determines in writing based upon the information in the record that this Covenant continues to be necessary to protect human health, safety, or the environment, this Covenant shall be superseded by any land use restriction covenant delineated in the RI/FS and subsequently recorded, provided that such superseding covenant contains, at a minimum, sections 4.01 and 4.03 of this Covenant and all new or continuing restrictions or institutional controls contained in the ROD and shall be executed by the Department and the Owner concurrently with the supersession of this Covenant. Nothing in this Covenant shall be construed to limit the right of any person to seek judicial review of the Director's foregoing determination. The Department shall then execute a release of this Covenant in a form that may be recorded in the Office of the County Recorder of the County of Monterey. Such superseding covenant shall run with the land and shall also contain appropriate provisions so that it can be enforced. No termination or other terms of this Covenant shall extinguish or modify the retained interest held by the United States.

7.03. Reservation of Rights. Nothing in this Covenant shall be construed to limit or abridge the power or authority of the Department to take any enforcement action authorized by law, or to take any other action provided by law to protect human health, safety or the environment.

ARTICLE VIII

MISCELLANEOUS

8.01 No Dedication Intended. Nothing set forth in this Covenant shall be construed to be a gift or dedication, or offer of a gift or dedication of the Property, or any portion thereof, to the general public or anyone else for any purpose whatsoever.

8.02 State of California References. All references to the State of California and the Department include successor agencies/departments or other successor entity.

8.03 Recordation. The Covenantor shall record this Covenant, with all referenced Exhibits, in the County of Monterey within ten (10) days of the Covenantor's receipt of a fully executed original.

8.04 Notices. Whenever any person gives or serves any Notice ("Notice" as used herein includes any demand or other communication with respect to this Covenant), each such Notice shall be in writing and shall be deemed effective: (1) when delivered, if personally delivered to the person being served or to an officer of a corporate party being served; or (2) three business days after deposit in the mail, if mailed by United States mail, postage paid, certified, return receipt requested:

To U.S. Army: Commander, DLIFLC and POM
 ATTN: ATZP-CDR
 Presidio of Monterey, California 93944-5006

To Department: Anthony J. Landis, P.E.
 Chief Northern California Operation
 Office of Military Facilities
 Department of Toxic Substances Control
 10151 Croydon Way, Suite 43
 Sacramento, California 95827

To City: City Manager
 City of Marina
 211 Hillcrest Avenue
 Marina, California 93933

Any party may change its address or the individual to whose attention a Notice is to be sent by giving written Notice in compliance with this paragraph.

8.05 Partial Invalidity. If any portion of the Restrictions or other term set forth herein is determined by a court of competent jurisdiction to be invalid for any reason, the surviving portions of this Covenant shall remain in full force and effect as if such portion found invalid had not been included herein.

8.06 Attachments. All attachments referenced in this Covenant are deemed incorporated into this Covenant by reference.

8.07. Section Headings. The section headings set forth in this Covenant are included for convenience and reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Covenant.

8.08. Representative Authority. The undersigned representative of each party to this Covenant certifies that he or she is fully authorized to enter into the terms and conditions of this Covenant and to execute and legally bind that party to this Covenant.

8.09 Statutory References. All statutory references include successor provisions.

{Signatures follow}

Karen R. Cooper
NOTARY PUBLIC

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of

Sacramento

SS.

On 3rd October 2004, before me,

Date

Linda A. Blue

Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared

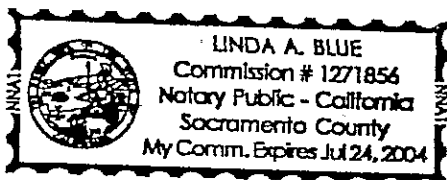
Anthony John Lades

Name(s) of Signer(s)

☐ personally known to me

☒ proved to me on the basis of satisfactory evidence

to be the person~~s~~ whose name~~s~~ is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity~~(ies)~~, and that by his/her/their signature~~s~~ on the instrument the person~~s~~ or the entity upon behalf of which the person~~s~~ acted, executed the instrument.



WITNESS my hand and official seal.

Linda A. Blue
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Covenant to restrict use of property

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer

Signer's Name: _____

- ☐ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

IN WITNESS WHEREOF, the DEPARTMENT OF TOXIC SUBSTANCES CONTROL,
STATE OF CALIFORNIA has caused these presents to be executed on this 3 day of
October, 2000, by Site Mitigation Branch Chief
(Title)

DEPARTMENT OF TOXIC SUBSTANCES CONTROL

Anthony J. Lander

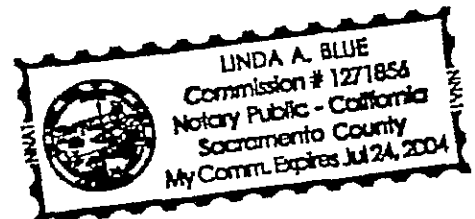
ACKNOWLEDGMENT

STATE OF CALIFORNIA)
)ss
COUNTY OF SACRAMENTO)

I, the undersigned, a Notary Public in and for the State of California, County of Sacramento, whose commission as such expires on the 24th day of July, 2004, do hereby certify that on this day personally appeared before me in the said State of California, County of Sacramento, Anthony J. Lander, whose name is signed to the foregoing document dated the 3rd day of October, 2000, and acknowledges the same for and on behalf of the Department of Toxic Substances Control.

Given under my hand this 3rd day of October, 2000.

Linda A. Blue
NOTARY PUBLIC



END OF DOCUMENT